In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1191

FRED H. ADLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 433 F. 2d 1282.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to January 1, 1971, and on January 2, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an accountant's summaries of corporate records were properly introduced into evidence.

416-648—71

STATEMENT

After a lengthy jury trial in the United States District Court for the Southern District of Florida, petitioner and others were convicted of one count of conspiracy to violate 15 U.S.C. 77q(a) and 18 U.S.C. 1341, seven counts of fraud in the sale of securities in violation of 15 U.S.C. 77q(a), and four counts of mail fraud in violation of 18 U.S.C. 1341. Petitioner was sentenced to six months' imprisonment on one count and three-years' probation on each remaining count, these sentences to run concurrently (R. 4208). His conviction was affirmed by the court of appeals.

The evidence at trial showed that mortgages and mortgage notes were offered for sale pursuant to a promotional campaign involving false and misleading advertising as well as other omissions and untrue statements of material facts (R. 432–434, 484–485, 715–721, 1207, 1506–1515, 1612–1613, 1715, 1900, 1977, 2043–2045, 2518, 3430). These securities were issued and sold by American Bonding Mortgage Co., Inc. (ABM), the hub of a complex of numerous corporations so interlocked that they in fact operated as one business.[1] Although ABM was insolvent from inception, it nevertheless accepted, during the approximately four years of its operation, over $9,000,000 from investors (R. 2719, 2867). The funds so obtained were used to finance large advertising, travel, entertainment

[1] While the interrelated nature of ABM and its affiliates can be fully understood from an examination of the entire trial record (R.), the following references provide an adequate indication of the nature of the complex: R. 427, 915–919, 2146, 2773–2776, 2819–2823, 3176–3178, 3275–3276, 3753, 3759.

and promotion expenses, the development and purchase of real estate, payment of interest to investors for whom mortgages had not yet been secured, purchase of mortgages of questionable value, and numerous personal expenses (R. 817, 920, 927–928, 938–939, 1238, 1242, 2004–2005, 2365–2368, 2728, 2736, 2740, 2748, 2794–2795, 2826–2841, 2852, 2856–2860, 3183, 3629).

Among the misrepresentations employed to defraud investors were the following:

(a) That the mortgage investments were completely safe, when in fact ABM and its affiliates were insolvent from the time they commenced doing business (R. 1207, 2866);

(b) That the mortages were insured as required by Florida law, while in actuality a vast portion of the delivered mortgages were upon vacant, unimproved land—contrary to representations that they were on owner-occupied land (R. 1575, 2503)—and as such were not insurable under the applicable Florida statutes (R. 1016–1018, 1140–1144, 1393–1395, 1409, 1612–1613, 1715, 1900, 2055, 2078, 2381–2382, 2399, 2419, 2518);

(c) That investors would receive first or second mortgages on improved property, when, in many instances, they actually received third mortgages or no mortgage at all (R. 1467–1469, 1685, 1977, 2059, 2064, 2133, 2410, 2470–2473, 2514, 2523–2525); and

(d) That the companies issuing the mortgages were independent of the companies insuring the mortgages, when in fact these various companies were all ABM

affiliates; that the insuring companies were financially sound, when they were actually insolvent and had no reserves with which to indemnify losses (R. 1012, 1604, 1611–1612, 2201–2209, 2216, 2219, 2243–2344, 2620, 2623, 2641).

During the course of the trial, government exhibits summarizing the disposition of funds by ABM and its affiliates were introduced into evidence over the objection of defense counsel (R. 2707, 2723). These summaries were prepared by the government's witness, George M. Callahan, a Certified Public Accountant and an experienced staff member of the Securities and Exchange Commission (R. 2700–2701), after an extensive investigation of ABM's corporate records. The corporate records were not introduced into evidence but were identified at trial and were available to the defense for purposes of cross-examination (R. 628–629, 2706–2707, 2711, 2724).

ARGUMENT

Although not questioning either the qualifications of the government's accountant witness (Callahan) or the accuracy of his summaries, petitioner argues that it was error for the trial court to admit into evidence charts and records he prepared to summarize his investigation of corporate books and records, since the records themselves were not put in evidence. The contention confuses two well-established principles of law.

On the one hand, it is the general rule that summaries supported by primary evidence in the record may be introduced to aid the jury in comprehending

a complex fact situation, so long as the summaries offer a fair representation of the evidence already before the jury, *United States* v. *Johnson,* 319 U.S. 503; *Conford* v. *United States,* 336 F. 2d 285 (C.A. 10).[2] There is no requirement that such summaries have their basis in expert testimony or technical matters, such as a firm's accounts.

On the other hand, the law also recognizes that if the possible evidence in a case encompasses such a tremendous volume of technical records that jury examination of those records would be a practical impossibility, an expert's summaries of the entries in these books and records are admissible as evidence without admitting the primary sources. *Stevens* v. *United States,* 206 F. 2d 64 (C.A. 6); *Greenhill* v. *United States,* 298 F. 2d 405 (C.A. 5), certiorari denied, 371 U.S. 830, 372 U.S. 968; *United States* v. *Willis,* 322 F. 2d 548, 551 (C.A. 3); *Gradsky* v. *United States,* 342 F. 2d 147, 152 (C.A. 5), vacated on other grounds, 383 U.S. 265; 4 Wigmore, *Evidence* (3d ed.), Sec. 1230. In such a case, the summarizer's qualifications must be established, the original documents must be available to the adverse party at the hearing, and the person who prepared the summaries must be present for cross-examination, *Greenhill, supra.*

[2] In the trial of this case, a *Johnson* question was raised and the court sustained an objection to the government's introduction of summaries of certain documents already in evidence on the ground that this would be an invasion of the jury's province, since the jury could adequately evaluate the documents without assistance (R. 2742–2744).

These requirements were fulfilled in this case. The trial court found that the corporate records were so extensive that it would not be feasible for the jury to examine their entire contents (R. 2902–2904). The records were marked for identification and were available at trial for inspection by defense counsel. And the witness Callahan, qualified as an expert and the compiler of the summaries, was available for cross-examination.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
SHIRLEY BACCUS-LOBEL,
Attorneys.

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971